84-880

Office - Supreme Court, U.S.
FILED
NOV 29 1984
ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court OF THE United States

OCTOBER TERM, 1984

SHAMROCK FOODS COMPANY,
an Arizona corporation,
Petitioner,

vs.

STATE OF ARIZONA, DARRYLL J. WALTON and MARTHA WALTON, husband and wife; MICHAEL A. HALL and PEGGY K. HALL, husband and wife; CURRIN SHIELDS and MARJORIE SHIELDS, husband and wife,
Respondents.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

DAVID L. WHITE
JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Counsel for Petitioner

QUESTIONS FOR REVIEW

1. Can indirect retail purchasers circumvent *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) by alleging a vertical conspiracy to fix both wholesale and retail prices after obtaining a settlement for their claim of passed-on damages from a horizontal conspiracy to fix wholesale prices?

2. May retail purchasers be judicially estopped from shifting their theory of liability from a horizontal conspiracy to fix wholesale prices to a vertical conspiracy to fix wholesale and retail prices after having been compensated by settlement of the wholesale claim?

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONTRADICTS THIS COURT'S DECISION IN *ILLINOIS BRICK*	6
A. The facts in this case are legally indistinguishable from *Illinois Brick*	7
B. The Court of Appeals' decision violates *Illinois Brick* and will result in possible multiple liability and overly-complex proof of damages	8
II. THE NINTH CIRCUIT'S DECISION OVERSTEPS THE BOUNDS OF PROPER APPELLATE REVIEW AND	

TABLE OF CONTENTS (Cont'd.)

Page

ELIMINATES THE DISTRICT COURTS' DISCRETION TO INVOKE JUDICIAL ESTOPPEL 11

A. In violation of the judicial estoppel doctrine, the retail purchasers repeatedly shifted their theory of the case to obtain unfair advantage 11

B. The Ninth Circuit overstepped the bounds of appellate review by second-guessing the district court 12

C. The opinion below undercuts the district courts' ability to regulate the conduct of litigants and creates a conflict among the circuits 14

CONCLUSION 17

APPENDIX A-1

TABLE OF AUTHORITIES

Cases	*Pages*
Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982)	15
In re Beef Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied sub nom, Safeway Stores, Inc. v. Meat Price Distributors Ass'n*, 449 U.S. 905 (1980)	15
California v. Standard Oil of California, _____ U.S. _____ 104 S.Ct. 972 (1984)	7
In re Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation, 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub nom, California v. Standard Oil of California*, _____ U.S. _____, 104 S. Ct. 972 (1984)	3
Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980)	14
Florida Power Corp. v. Granlund, 78 F.R.D. 441 (M.D. Fla. 1978)	9
Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977)	*passim*
Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982)	13-14
Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980)	15
In re Midwest Milk Monopolization Litigation, 730 F.2d 528 (8th Cir.), *cert. denied sub nom, State of Illinois v. Associated Milk Producers, Inc.*, _____ U.S. _____, 53 U.S.L.W. 3285 No. 84-271, October 16, 1984)	15
Railway Co. v. McCarthy, 96 U.S. 258 (1877)	15
Raulie v. United States, 400 F.2d 487 (10th Cir. 1968)	13

TABLE OF AUTHORITIES (Cont'd.)

Cases	*Pages*
Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3d Cir. 1953)	12,15
State of Illinois v. Associated Milk Producers, Inc., _____ U.S. _____, 53 U.S.L.W. 3285 (No. 84-271, October 16, 1984)	7
Technical Learning Collective v. DBAG, 1980-81 CCH Trade Cas. ¶ 63,612 (D. Md. 1980)	15
In re United Corp., 283 F.2d 593 (3d Cir. 1960)	14
United Virginia Bank v. B. F. Saul Real Estate, 641 F.2d 185 (4th Cir. 1981)	15
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	14
Statutes and Rules	
15 U.S.C. § 1	2
15 U.S.C. § 15	2
28 U.S.C. § 1254	1
28 U.S.C. § 1337	2
A.R.S. § 44-1402	2
Other Authorities	
American Bar Association, "Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*," 52 *Antitrust L.J.* 841 (1984)	10
Beane, J., "Passing-On Revived: An Antitrust Dilemma," 32 *Baylor L. Rev.* 347 (1980)	10-11
Cavanagh, E., "*Illinois Brick* Revisited: An Analysis of a Developing Antitrust Jurisprudence," 17 *Valparaiso U. L. Rev.* 63 (1983)	10,14,15

TABLE OF AUTHORITIES (Cont'd.)

Cases *Pages*

Note, "Estoppel Against Inconsistent Positions in Judicial Proceedings," 9 *Brooklyn L. Rev.* 245 (1940) 15

No.

In the Supreme Court OF THE United States

OCTOBER TERM, 1984

SHAMROCK FOODS COMPANY,
an Arizona corporation,
Petitioner,

vs.

STATE OF ARIZONA, DARRYLL J. WALTON and MARTHA WALTON, husband and wife; MICHAEL A. HALL and PEGGY K. HALL, husband and wife; CURRIN SHIELDS and MARJORIE SHIELDS, husband and wife,
Respondents.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The district court's opinion was filed but not reported. A copy of the filed opinion is attached to this petition as part of the appendix. The amended opinion of the United States Court of Appeals is reported at 729 F.2d 1208 (Appendix C-1); its original opinion is unreported but is attached to this petition. (Appendix B-1).

JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

The Court of Appeals filed its opinion on April 3, 1984. The Court amended its opinion by order entered June 21, 1984. Pursuant to the Court's order granting a stay of mandate, the mandate has not issued. The Court of Appeals

denied petitioner's petition for rehearing by order entered July 10, 1984. On September 25, 1984, the Honorable William H. Rehnquist, Associate Justice, entered an order extending the time to file this petition for a writ of certiorari to and including December 6, 1984.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15 Section 1, Trusts, Etc. In Restraint of Trade Illegal . . .

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Arizona Revised Statutes, Title 44, Section 1402.

"A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful."

STATEMENT OF THE CASE

In 1974, riding on the coattails of actions brought by the United States alleging a conspiracy by dairies to fix wholesale prices, various purchasers of dairy products brought class actions against Shamrock and other dairies. Included among these suits were one brought by grocery stores who directly bought from the dairies [1] and another brought by the retail purchasers (the respondents here) who bought at home delivery and from grocery stores. [2]

The retail purchasers admitted early in this litigation that they were damaged solely by the pass-on of wholesale overcharges:

---

[1] *Miller Dairyland v. Borden, Inc.*, CIV 74-571 PHX CAM.

[2] *Walton v. Borden, Inc.*, CIV 74-736 PHX CAM. The claim relating to direct home delivery sales was not included in Shamrock's summary judgment and is not at issue here. The jurisdiction of the district court for all these actions rested upon 15 U.S.C. § 15 and 28 U.S.C. § 1337.

> We will prove ... that ... [d]efendants' prices were raised to artificially high levels, and those increased prices, initially paid by the retailer, had the inevitable effect of increasing, to some degree, the price paid by consumers.
> (C.R. 49 at 4).

Like the god Proteus, however, the retail purchasers' claim proved remarkably adept at changing its form. Following this Court's decision in *Illinois Brick*, the retail purchasers characterized their claim for passed-on overcharges as an "umbrella" theory and argued that such a claim was not barred by *Illinois Brick*.[3] (C.R. 310 at 16-17). Plaintiffs pointed to the 1975 deposition of Norman McClelland, President of Shamrock, as the basis for this theory. (C.R. 310 at 8-10).

Soon after *Illinois Brick* was decided, all of the dairies except Shamrock settled all of the claims against them. In order to share in that settlement, the retail purchasers again shifted the nature of their claim back to an assertion of a pass-on of wholesale overcharges. In that 1978 settlement, the consumer plaintiffs took 90% of the settlement shared with the groceries, or $2,900,000. They obtained their large share upon their affirmation to the district court that the grocery stores had merely passed on allegedly fixed wholesale overcharges to them. (C.R. 389 at 17, 19-20 and C.R. 430 at 20-21).

In 1981, Shamrock settled the grocery stores' claims against it for $100,000. (C.R. (74-571) 43 and C.R. 743 at 13,

---

[3] *See generally In re Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied sub. nom California v. Standard Oil Co. of California*, _____ U.S. _____, 104 S. Ct. 972 (1984) (explaining and rejecting umbrella theory).

¶26).[4] That settlement was reached only after a majority of Shamrock's largest grocery store purchasers had opted out of the grocery store class. (Reporter's Transcript ("R.T.") 200 and C.R. 743 at 13, ¶27). While the retail purchasers were fully aware of Shamrock's settlement and participated in the other dairies' settlement, they did not alert the court or Shamrock that they soon would assert a new theory involving the grocery stores as conspiring defendants rather than as victims.

In 1982, Shamrock moved for partial summary judgment on the retail purchasers' claims for indirect purchases, citing *Illinois Brick.* The consumers sought to avoid *Illinois Brick* by shifting their theory from a horizontal wholesale price conspiracy by dairies (with damages passed on to the consumers) to a vertical conspiracy between dairies and groceries to fix retail prices (with only direct damages to consumers). (R.T. at 244-245 and C.R. 745 at 3, 40 and 43-44.) Indeed, though the retail purchasers had recently collected $2.9 million on their wholesale claim, they asked the district court to grant them summary judgment that no wholesale conspiracy had ever occurred. (C.R. 745 at 7, n.6 and C.R. 755 at 52).

This change in theory directly contradicted the earlier settlement based on wholesale prices with most of the damages supposedly passed on to the consumers. (C.R. 389 at 19). The consumers cited no new evidence for their new theory: they relied upon the same portion of the *1975* deposition of Norman McClelland which they earlier had used to assert an "umbrella" claim. (C.R. 746 at 5-8, ¶4; C.R. 310 at 8-10). Evidence of a vertical conspiracy was thus present from the very beginning, long before any settlements occurred.

---

[4] This litigation involved a number of separate actions which were consolidated. The district court therefore maintained both a master and separate docket files. References to papers in the master file will be referred to as "C.R. _____". References to papers in individual files will be designated as "C.R. (Docket No.) _____ _____".

The district court, having approved the prior settlements of the wholesale claim, refused to permit plaintiffs to shift their claim against Shamrock and granted summary judgment to Shamrock. The court found that the consumer plaintiffs had previously alleged a conspiracy to fix wholesale prices and the court had approved the shared settlement "in order to compensate [for] passed-on damages." (C.R. 753). The court held the retail purchasers' shift was barred by judicial estoppel and *Illinois Brick*:

> Plaintiffs' statements that there was no pass-on of damages and that there are two discreet [sic] conspiracies, retail and a wholesale, are belied by past settlements, settlements which shared proceeds between different levels of the distribution scheme . . . The same plaintiffs who spoke in favor of that settlement, may not now pretend that it never took place.
> (Order Docket No. 753. Appendix A-3.)

On appeal, the consumers asserted yet another theory: there were really two discrete conspiracies — retail and wholesale — and the consumers were only seeking recovery for retail overcharges not involving any pass-on. 729 F.2d at 1211, 1213.

A three-judge panel of the Ninth Circuit Court of Appeals reversed the district court on two grounds. First, it held that *Illinois Brick* was not involved because the retail purchasers were alleging two discrete conspiracies and had offered to "prove that there were no wholesale overcharges at all." 729 F.2d at 1213.

Second, the panel held that while a "close case" for judicial estoppel was present, the retail purchasers had shifted their theory in response to some unspecified "advanced discovery." 729 F.2d at 1215.

Plaintiffs again shifted the basis of their claim following the panel's decision and its denial of Shamrock's petition for rehearing. In response to a motion for summary judgment brought by the defendant grocery stores and another defendant dairy, the retail purchasers argued that only one

conspiracy operated at the same time on both the retail and wholesale price levels:

> The retail efforts of the conspiracy embraced the same group of processors and *exactly the same time period* as the wholesale effort. . . .
>
> *The Consumer class alleges injury from the same broad conspiracy to fix Arizona dairy prices alleged in the Governmental [wholesale] complaint.* . . .
>
> Whether it was a separate part of the general conspiracy or a separate but related conspiracy is largely a question of semantics . . . irrelevant to the issues before the Ninth Circuit. No one can seriously dispute the obvious relationships between the acts of wholesale and retail conspiracy in Arizona.
>
> (Motion for Reconsideration at 7-8, quoting plaintiffs' pleadings before the district court) (emphasis added).

Shamrock immediately moved the Ninth Circuit for reconsideration based on the retail purchasers' new shift in theory but the Court of Appeals denied that motion.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONTRADICTS THIS COURT'S DECISION IN *ILLINOIS BRICK*.

In reversing the district court, the Ninth Circuit violated both the letter and spirit of this Court's decision in *Illinois Brick*. First, it condemned Shamrock to possible duplicative liability and invited plaintiffs to seek recoveries which will be duplicative unless the retail purchasers prove two separate conspiracies: an "ineffective" conspiracy at the wholesale level and an "effective" retail level conspiracy not involving pass-on. Second, even if the plaintiffs could prove that fact, the complex proof of damages required is the very evil which this Court prohibited in *Illinois Brick*. The Ninth Circuit's decision thereby violates the two foundations of *Illinois Brick*. Moreover, the decision permits indirect

purchasers to circumvent the *Illinois Brick* rule by unjustifiably shifting their theory of the case.

A. The facts in this case are legally indistinguishable from *Illinois Brick*.

The facts presented in this case are essentially the same as those in *Illinois Brick*.[5] In *Illinois Brick*, direct and indirect purchasers of concrete block brought separate complaints against brick manufacturers alleging a conspiracy to fix prices at the wholesale level. 431 U.S. at 726-727. The manufacturers settled the complaints brought by the direct purchasers without prejudice to the indirect purchasers' actions. 431 U.S. at 727, n. 5. The indirect purchasers then sought to recover by proving that the wholesale overcharges were simply passed on to them by the direct purchasers (middlemen) who had already settled with the defendant manufacturers. 431 U.S. at 727-728.

In this case, just as in *Illinois Brick*, direct purchasers (grocery stores) and indirect purchasers (retail consumers) brought separate complaints against the dairies for an alleged conspiracy to fix wholesale prices. Just as in *Illinois Brick*, the retail purchasers here claimed that their damages were caused by a pass-on of wholesale overcharges to them:

> We will prove ... that ... [d]efendants' prices were raised to artificially high levels, and those increased prices, initially paid by the retailer, had the inevitable effect of increasing, to some degree, the price paid by consumers.
> (C.R. 49 at 4).

---

[5] This case differs from other cases in which certiorari was unsuccessfully sought on *Illinois Brick* related issues. *E.g., California v. Standard Oil of California*, _____ U.S. _____, 104 S.Ct. 972 (1984) (issue of whether *Illinois Brick* bars retail consumers' claim of conspiracy to fix retail prices not squarely addressed by the Court of Appeals); *State of Illinois v. Associated Milk Producers, Inc.*, _____ U.S. _____, 53 U.S.L.W. 3285 (No. 84-271, October 16, 1984) (district court assumed middleman-conspirator exception to *Illinois Brick* existed, but denied motion to amend to join middlemen years after *Illinois Brick* decided).

And, just as in *Illinois Brick*, some of the direct purchasers here (the groceries) settled their claims with the dairies, including Shamrock.

The only fact differentiating this case from *Illinois Brick* is one which *adds* to the reasons to apply the *Illinois Brick* doctrine in this case. In *Illinois Brick*, the indirect purchasers did not share in any of the settlements of the alleged wholesale conspiracy. In contrast, the retail purchasers here took 90% of one of the settlement funds on their affirmation to the district court that the grocery stores had passed on most of the alleged wholesale overcharges to the consumers. (C.R. 389 at 17, 19-20 and C.R. 430 at 20-21). Now, despite that settlement, they seek to shift their theory to collect again for a vertical conspiracy allegedly operating on both the wholesale and retail levels.

B. The Court of Appeals' decision violates *Illinois Brick* and will result in possible multiple liability and overly-complex proof of damages.

This Court rejected the indirect purchasers' actions in *Illinois Brick* for two reasons. First, the Court recognized that permitting indirect purchasers to sue for passed-on overcharges would create a risk of multiple liability. 431 U.S. at 730. Second, the Court rejected any attempt to allocate the overcharge among the various levels of distribution as involving an overly complex proof of damages based upon a speculative "economist's hypothetical model" rather than the "real economic world." 431 U.S. at 741-43.

The Court of Appeals' decision should be reversed because it violates these principles of *Illinois Brick*.

First, the Ninth Circuit erred in holding that the retail purchasers, after benefitting from a wholesale claim, can avoid *Illinois Brick* by proving that no pass-on of wholesale overcharges occurred. 729 F.2d at 1211, 1213. It was exactly that type of overly complex proof, based upon speculative "economist's hypothetical model[s]," which the Court prohibited in *Illinois Brick*.

It makes no difference whether the retail purchasers are trying to prove how much pass-on might have occurred, as in *Illinois Brick*, or, as here, that pass-on allegedly did not occur. 729 F.2d at 1211, 1213. In either case, overly complex and unrealistic economic models must be utilized.

Second, the retail purchasers allege a vertical conspiracy to fix *both* wholesale and retail prices. They assert this claim years after Shamrock settled the wholesale claims with the grocery stores and after the retail purchasers shared in the other dairies' settlement of the wholesale claims. As this Court recognized in *Illinois Brick*, double liability will result if indirect purchasers can proceed with separate actions after direct purchasers have settled or obtained judgment on their claims. 431 U.S. at 731, n. 11.

The plaintiffs' argument that there were two "separate" conspiracies is immaterial. This is not a simple retail price maintenance case, through the Ninth Circuit premised its holding on such a view of the claim. See 729 F.2d at 1212-13. *Compare* this case *with Florida Power Corp. v. Granlund*, 78 F.R.D. 441, 443 (M.D. Fla. 1978) (conspiracy to fix resale prices). First, the retail purchasers asserted two conspiracies, and then recently claimed a single conspiracy, operating *at the same time at both wholesale and retail levels.* (See Shamrock Motion for Reconsideration at 8). Second, the retail purchasers for years rested their case on a horizontal wholesale-level conspiracy and even obtained a settlement on that basis. Third, as the Ninth Circuit conceded, in order to convert this case into a retail price conspiracy the retail purchasers would have to prove that no pass-on of wholesale overcharges ever occurred. 729 F.2d at 1213.

The Ninth Circuit's decision therefore resurrects the very evils which this Court eliminated in *Illinois Brick*. The first evil is that it will allow indirect purchasers to circumvent *Illinois Brick* after years of alleging a horizontal, wholesale conspiracy by simply amending their claim to allege a vertical conspiracy to fix wholesale and retail prices. Such

circumvention of *Illinois Brick* is a major antitrust problem which should be addressed by this Court:

> When *Illinois Brick* foreclosed recovery for passed-on wholesale overcharges, the temptation arose for plaintiffs to avoid the law by recasting their claims as a vertical conspiracy affecting only retail overcharges. Therefore, the courts must be alert to distinguish those situations in which there is a sure basis for alleging a vertical conspiracy from those in which vertical conspiracy is alleged merely to overcome the limitations of *Illinois Brick*. Obviously, there is a great potential for abuse. . .
>
> E. Cavanagh, "*Illinois Brick* Revisited: An Analysis of a Developing Antitrust Jurisprudence," 17 *Valparaiso U.L. Rev.*, 63, 96 (1983).

The second evil is that permitting both direct and indirect purchasers to proceed will clog our courts with a multitude of suits and may result in multiple liabilities and recoveries. Even if all parties are joined in a single action, no procedural device can avoid the overly-complex proof of the existence, non-existence and amount of pass-on. *Illinois Brick,* 431 U.S. at 731, n. 7 and 739-743. This complex evidentiary problem and clogging of the courts with indirect purchaser claims in the guise of alleging a vertical conspiracy can only result in a lessened enforcement of the antitrust laws by those directly harmed by violations. 431 U.S. at 745-7.

This Court's decision in *Illinois Brick* rested on the belief that enforcement of the antitrust laws would not be diminished but strengthened by preserving the ability of direct victims to recover. Recent empirical surveys confirm this belief. Direct purchasers continue to bring and maintain claims under the antitrust laws. Their claims are effective in deterring antitrust violations as well as in compensating victims for their injuries. "Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*," 52 *Antitrust L.J.* 841, 846 (1984). *See also* J. Beane, "Passing-

On Revived: An Antitrust Dilemma", 32 *Baylor L. Rev.* 347, 366 (1980) ("Three years of experience with *Illinois Brick* have taught that the decision did not significantly alter or impact the overall enforcement of the antitrust laws. . . . The predicted dire consequences have not materialized.")

The *Illinois Brick* doctrine withstands the test of time. Circumvention of the doctrine only undermines the policies served by *Illinois Brick.* Attempts to circumvent the indirect purchaser rule are a systemic problem for antitrust law and should be stopped. The Ninth Circuit's decision approves such circumvention and should be reversed.

II. THE NINTH CIRCUIT'S DECISION OVERSTEPS THE BOUNDS OF PROPER APPELLATE REVIEW AND ELIMINATES THE DISTRICT COURTS' DISCRETION TO INVOKE JUDICIAL ESTOPPEL.

A. In violation of the judicial estoppel doctrine, the retail purchasers repeatedly shifted their theory of the case to obtain unfair advantage.

The retail purchasers' case began, before *Illinois Brick* was decided, as a claim for overcharges passed-on from the wholesale level to them. (C.R. 49 at 4). The retail purchasers repeatedly shifted to new theories as their needs varied. They first shifted to an "umbrella" theory to avoid *Illinois Brick.*

They then returned briefly to the wholesale theory to obtain $2.9 million in a settlement involving three dairies and the groceries. They justified that share on the claim that wholesale overcharges had been passed-on to them by the groceries.

Plaintiffs next disavowed the very existence of wholesale price-fixing — the basis for obtaining the settlement. They attempted to avoid *Illinois Brick* by alleging that the dairies and middlemen had embarked on a discrete conspiracy to fix retail prices in which pass-on of wholesale overcharges was

not involved. The retail purchasers next offered a new theory to the Ninth Circuit that there were two conspiracies, of which only the retail and not the wholesale price-fixing conspiracy was "effective." Finally, they told the district court that their claim was for a single conspiracy operating at both the wholesale and retail levels.

The district court applied judicial estoppel and refused to allow the retail purchasers to belatedly invent a new claim to try to recover a second time: "What you have done is simply construct a new legal theory," the court observed. (R.T. at 304). When the retail purchasers disavowed the truth of their original wholesale theory, the Court pointedly noted: "But now they [the wholesale claims] are settled, the other claim becomes the true one." (R.T. at 300).

The District court's order dismissing the retail purchasers' claims stated:

> Plaintiffs' statements that there was no pass-on of damages and that there are two discreet [sic] conspiracies, retail and a wholesale, are belied by past settlements, settlements which shared proceeds between different levels of the distribution scheme . . . The same plaintiffs who spoke in favor of that settlement, may not now pretend that it never took place.
> (Order, Docket No. 753; Appendix, A-3).

The district court therefore appropriately applied judicial estoppel to prevent the retail purchasers from "playing fast and loose with the courts." *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953).

B. The Ninth Circuit overstepped the bounds of appellate review by second-guessing the district court.

In reversing, the Ninth Circuit accorded no deference whatever to the district court's superior position to assess the facts. The court also declined to recognize the district court's discretion to apply judicial estoppel. The Ninth Circuit did not even give "lip service" to the ordinary deferential standards of review. Instead, it engaged in fact-

finding of its own and independently decided not to apply judicial estoppel even though this was a concededly "close case." 729 F.2d at 1215-1216.

The Ninth Circuit rationalized its decision by stating that, while the retail purchasers had definitely shifted their theory, 729 F.2d at 1210, 1214, their theories were not really inconsistent. 729 F.2d at 1215. The court also excused the shifts as a "response to advanced discovery." *Id.* This holding was contrary to the district court's determinations. The retail purchasers relied in the district court upon a 1975 deposition as the factual basis for such an allegation. In fact, they told the district court that the 1975 deposition was the "smoking pistol" of the retail conspiracy. (R.T. at 221-223). Even if later discovery reinforced the retail claim, that discovery was not the reason for the shift because the retail purchasers learned of their retail claim in 1975.

The appellate court took it upon itself to determine the facts and decide whether judicial estoppel should apply. It neither held that the district court's application of judicial estoppel was an "abuse of discretion" nor concluded that its findings were "clearly erroneous."

This approach was fundamentally and dangerously wrong. Recognizing their limited function as intermediate courts of review, the Courts of Appeals usually exercise restraint. *E.g., Raulie v. United States,* 400 F.2d 487, 509 (10th Cir. 1968). The Ninth Circuit, however, independently decided the judicial estoppel issue. Such second-guessing oversteps the court's proper bounds and infringes upon the district court's peculiar role. District courts are clearly in a much better position to decide facts, such as whether a party has unfairly shifted its legal theories. In addition, the district court had worked with this complex antitrust case for ten years. These factors required appellate deference.

This Court has found it necessary in recent years to admonish the Courts of Appeals to adhere faithfully to the "clearly erroneous" and "abuse of discretion" standards. *See, e.g., Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844

(1982) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) ("clearly erroneous" standard); *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980) ("abuse of discretion" standard). This Court's review is again needed to return the Courts of Appeals to their proper, assigned function.

C. The opinion below undercuts the district courts' ability to regulate the conduct of litigants and creates a conflict among the circuits.

The Ninth Circuit's decision has other serious consequences for the federal judicial system. In conflict with the other circuits which have considered this problem, the Ninth Circuit permitted the plaintiffs to circumvent *Illinois Brick* with a chameleonic view of their own case. The Court of Appeals interfered with the district court's inherent power to regulate the conduct of parties appearing before it. This power has always been thought to belong peculiarly to the district court's discretion. *E.g., In re United Corp.*, 283 F.2d 593, 596 (3d Cir. 1960).

Judicial estoppel is an especially important aspect of the district courts' self-regulatory power: it is the principal means for those courts to prevent parties from abusing the judicial system to obtain unfair advantages. When a party plays "fast and loose with the courts" to obtain an advantage for himself, he both commits an "affront to judicial dignity" and abuses the judicial process. *Scarano v. Central R. Co. of New Jersey*, 203 F.2d at 513.

It is even more troublesome that the Ninth Circuit refused to permit the district court to use judicial estoppel in an antitrust case. The doctrine is particularly needed to prevent indirect purchasers from circumventing *Illinois Brick* by merely alleging a vertical conspiracy. *See* E. Cavanagh, *supra* at 96.

The federal courts have found it frequently necessary to apply estoppel, waiver or similar theories to prevent antitrust plaintiffs from shifting theories merely to avoid

Illinois Brick. E.g., *In re Beef Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied sub. nom Safeway Stores, Inc. v. Meat Price Distributors Ass'n*, 449 U.S. 905 (1980); *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528 (8th Cir.), *cert. denied sub. nom State of Illinois v. Associated Milk Producers, Inc.*, _____ U.S. _____, 53 U.S.L.W. 3285 (1984); *Technical Learning Collective v. DBAG*, 1980-81 CCH Trade Cases ¶ 63,612 (D. Md. 1980). In light of the foregoing cases, the Ninth Circuit's decision overruling such a discretionary corrective measure creates a conflict among the circuits. Moreover, this case exemplifies a broad problem indicated by the cited cases and by Professor Cavanagh: widespread attempts in the lower federal courts to evade the *Illinois Brick* doctrine.

The utility of judicial estoppel is hardly confined to antitrust cases, however. Rather, it is a venerable and highly effective tool for regulating specific conduct and deterring future courtroom misconduct in a wide variety of situations. Note, "Estoppel Against Inconsistent Positions in Judicial Proceedings," 9 *Brooklyn L. Rev.* 245, 262 (1940). This Court's jurisprudence clearly demonstrates the important role of judicial estoppel in the administration of justice. By 1877, for example, the Court referred to the doctrine as "settled." *Railway Co. v. McCarthy*, 96 U.S. 258, 267-68 (1877).

Judicial estoppel has always been broadly and liberally applied, and the traditional requirements of other forms of estoppel held not to be necessary. *E.g., Scarano, supra; Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980); *United Virginia Bank v. B.F. Saul Real Estate*, 641 F.2d 185, 190 (4th Cir. 1981). The Ninth Circuit's decision not only contradicts this general view, but also undercuts the liberality of the doctrine. Indeed, before the Ninth Circuit amended its opinion, it held that the doctrine could be applied only when certain facts were present, facts which *all*

other authorities on judicial estoppel agreed were not required. (See Appendix, B-11).

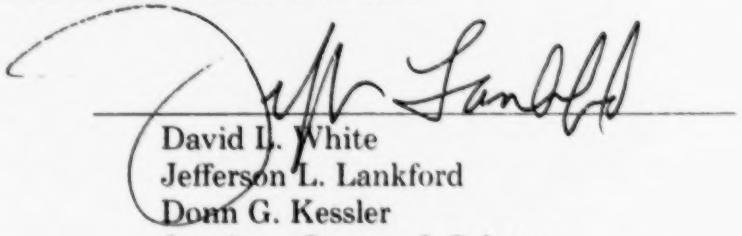
The Ninth Circuit's decision sends the wrong message to district courts and litigants. Its decision is that, even in a concededly "close case," the appellate court may prohibit the district court from acting "to protect the essential integrity of the judicial process." *Allen v. Zurich Ins. Co.*, 667 F.2d at 1166. The decision tells district judges, in effect, that while they may find that a party is unfairly "playing fast and loose," the district judge can do nothing about it unless the appellate court independently examines the situation and agrees.

The consequences on remand are predictably unfortunate. Protected by the district court's impotence, the offending party is free to commit further misconduct. In fact, that is precisely what occurred in this case. The Ninth Circuit reversed and remanded on the explicit premise that plaintiffs had alleged two separate, distinct conspiracies operating at different times. 729 F.2d at 1214. However, the retail purchasers told the district court shortly thereafter that they allege only a single conspiracy, operating at the same time and affecting both wholesale and retail prices. (See Shamrock's Motion to Reconsider at 6-8 and exhibits attached).

In sum, the judicial estoppel issue raises two questions important to the operation of the federal judicial system: (1) may an appellate court make judgments independent from, and without deference to, a district court's fact findings and discretionary procedural orders; and (2) does an appellate court's unwarranted refusal to permit a district court to apply judicial estoppel undermine the effectiveness of the doctrine as a tool of judicial administration?

CONCLUSION

For the reasons stated above, this Court should grant a writ of certiorari to the Ninth Circuit.



David L. White
Jefferson L. Lankford
Donn G. Kessler
Jennings, Strouss & Salmon
111 W. Monroe
Phoenix, Arizona 85003
(602) 262-5911
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE ARIZONA DAIRY PRODUCTS LITIGATION	MASTER FILE No. CIV 74-569A PHX CAM
THIS DOCUMENT RELATES TO:	
STATE OF ARIZONA, Plaintiff, vs. SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation, Defendants.	No. CIV 74-594 PHX CAM
DARRYLL J. WALTON, et al., Plaintiffs, vs. SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation, Defendants.	No. CIV 74-736 PHX CAM O R D E R

In 1974, the United States filed an indictment and civil complaint initiating the Arizona Dairy Litigation. These documents alleged a wholesale fixing of prices and allocation of customers.

Later in 1974 and early 1975, complaints were filed by private plaintiffs and the State of Arizona, on behalf of consumers, grocery stores, governmental bodies, restaurants and private health care facilities, alleging a conspiracy to fix the wholesale price of milk.

On June 9, 1977, the Supreme Court of the United States entered its decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Subsequently, the State amended its complaint to become co-representatives of the consumer class and added an allegation that grocery stores were co-conspirators. None of the grocery stores were named as co-defendants.

On October 13, 1978, the Court approved a settlement entered into between defendants Borden, Foremost, and Carnation, and the consumers and grocery store classes, in order to compensate passed-on damages.

In April, 1980, the State and a private plaintiff amended their complaints to join Beatrice Foods Company as a defendant. The private plaintiff's complaint also, for the first time, included an allegation that the grocery stores were co-conspirators.

On July 24, 1981, this Court approved a settlement between Shamrock and the grocery store class.

Presently before the Court is a Motion for Partial Summary Judgment filed by Shamrock, seeking dismissal of plaintiffs' claims against it for purchases made by consumers through grocery stores. Shamrock argues that under the lesson of *Illinois Brick*, it cannot be liable to such a remote purchaser.

In response, the defendants contend that the grocery stores were co-conspirators with the dairy producers. They also argue that they are presently attempting to collect damages resulting from a retail conspiracy. They assert that there was no pass-on damages, and that *Illinois Brick* is therefore inapplicable.

The plaintiffs' attempts to dodge the impact of *Illinois Brick* are not successful. Their allegations in light of the past history of this litigation are questionable.

A class of grocery stores has received, as plaintiffs, settlements with the defendants. The grocery stores have shared portions of these proceeds with consumers, according to plaintiffs' moving papers, so as to allocate passed-on damages. Shamrock, the movant in this motion, has also settled with a grocery store class, which accord was approved by the Court only last July. Plaintiffs remained mute throughout that and other settlement hearings about the fact that the Court was approving the payment of settlement proceeds to a class of co-conspirators.

Plaintiffs' statements that there was no pass-on of damages and that there are two discreet conspiracies, a retail and a wholesale, are belied by past settlements, settlements which shared proceeds between different levels of the distribution scheme. Plaintiffs' claims that Shamrock is not threatened with multiple liability, rings hollow when one considers that diary's past settlements with grocery stores. The same plaintiffs who spoke in favor of that settlement, may not now pretend that it never took place. Such a position was affirmatively waived by the plaintiffs, and they are estopped from successfully asserting it. The plaintiffs may not overcome the clear law of the case, law which they had an affirmative part in making.

In addition to the waiver and law of the case principles, the plaintiffs are also unable to show that the defendant runs no risk of being subject to multiple liability. Shamrock has settled with the grocery store class. Consumers have already received funds from the grocery store class, to make up for damages that they allegedly passed on. Shamrock may not be exposed to additional claims for damages from consumers.

An accurate computation of damages by a jury hearing a consumers' claim, in light of this history, would be a computational nightmare. *Illinois Brick* cannot countenance the continued viability of such a claim. Consequently,

IT IS ORDERED that the Motion for Partial Summary Judgment, filed by Shamrock Foods Company ofn June 9, 1982, is granted and all claims by plaintiffs for damages resulting from purchases of milk and other dairy products made by plaintiffs through grocery stores are dismissed.

DATED this 23rd day of July, 1982.

C. A. Muecke, Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
vs.
SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

DARRYLL J. ALTON, et al.,
Plaintiffs-Appellants,
vs.
SHAMROCK FOODS COMPANY, an Arizona corporation, and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

No. 82-5875
CV 74-569A PHX, CAM,
74-736 PHX, CAM

OPINION

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, Chief District Judge, Presiding.

Argued and Submitted — June 13, 1983

Before: KENNEDY and BOOCHEVER, Circuit Judges, and EAST, * Senior District Judge.

BOOCHEVER, Circuit Judge.

This is an action by five certified classes against several Arizona dairy product producers alleging a wholesale price-fixing conspiracy. During the course of the suit, all claims were settled except those by the consumer class against

* Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

Shamrock Foods Co. and another producer joined six years after initiation of the suit. Shamrock moved for partial summary judgment on the ground that the consumers' claims for pass-on damages from purchases of dairy products through grocery stores were barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The consumers contend that they have altered their theory of recovery to allege a retail price-fixing conspiracy including the intermediate grocery stores, thus avoiding *Illinois Brick*. The district court granted partial summary judgment finding the consumers estopped from changing theories of recovery so late in the litigation. The consumers appeal.

Facts

Following the institution of a federal civil and criminal wholesale price-fixing suit against Shamrock Foods Co., Borden Inc., Carnation Co., Foremost-McKesson Inc. and six of their officers, a number of private suits were filed against the corporations seeking damages and injunctive relief. On December 11, 1974, the district court consolidated the actions and certified plaintiff classes of consumers, grocery stores, hospitals, restaurants, and governmental entities.

The five classes subsequently reached a $4,075,000 settlement with all defendants except Shamrock. The settlement agreement and a separate agreement allocating the fund among the five classes were filed with the district court in April 1978. On September 21, 1979, Shamrock settled with the hospital, restaurant, and governmental classes and in mid-1981 Shamrock settled with the grocery store class. The settlements and the allocation agreement were formally approved by the district court, and each expressly preserved the consumer class claims against Shamrock. Thus, the only remaining claims were the consumer claims against Shamrock. These claims were of two types: for overcharges in sales of dairy products through grocery stores and for overcharges in direct sales from Shamrock by home-delivery.

In mid-1982, Shamrock filed a motion for partial summary judgment to dismiss all claims of the consumers regarding

damages for purchases of dairy products through grocery stores. It argued that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) required dismissal of the consumers' claims. The consumers responded that they have changed their theory of recovery to allege a price-fixing conspiracy including the dairy producers and the grocery stores to fix the retail price of dairy products.

The consumers point out that Shamrock and the other defendant dairies made retail home delivery sales in addition to wholesale sales to grocery stores and thus were both suppliers to and direct horizontal competitors with the grocery stores. When the grocery store prices fell too low, Shamrock and the other dairy defendants lost home delivery sales to the grocery stores. The consumers contend that the dairy producers conspired among themselves and with the grocery stores to raise and stabilize the retail price of dairy products to maintain more profits for all concerned.

In support of their contention, the consumers cite deposition testimony of employees of several dairy producers including Shamrock President Norman McClelland. This testimony tends to support the consumers' allegations that the dairy producers held meetings to discuss retail prices and regularly had communications with grocery stores with the purpose of acting as a go-between to give assurances that a price increase by one retailer would be met by competing retailers.

The district court granted Shamrock's motion on July 23, 1982 and entered final judgment on those claims pursuant to Fed. R. Civ. P. 54(b) on Septmeber 23, 1982. The consumer class now appeals the grant of partial summary judgment to Shamrock. We reverse.

Standard of Review

Reviewing a grant of summary judgment, the appellate court must view the evidence in the light most favorable to the party against whom summary judgment was granted and determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving

party was entitled to judgment as a matter of law. *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980).

Discussion

Shamrock makes two arguments that the grant of summary judgment is correct. First, they argue that when, as alleged in the present case, the policy concerns of *Illinois Brick* are present, that case bars suit no matter what theory is used. Second, they argue that the consumers relied to their advantage at various times on the wholesale price conspiracy/pass-on theory and may not at this late date change theories to a retail price conspiracy to avoid *Illinois Brick*. The district court granted summary judgment on the basis of both arguments.

A. *Illinois Brick*

The consumers do not dispute that at the initiation of their suit, their focus was on a wholesale price-fixing conspiracy. Because this theory of necessity implies a pass-on of damages to the retail level, the consumers do not dispute that *Illinois Brick* would preclude their recovery on their original theory regarding their purchase of dairy products from grocery stores. But they contend that they have changed their theory; they now allege that the retail intermediates, the grocery stores, were co-conspirators with the dairy producers to fix the price of dairy products at the retail level, and that none of the damages now claimed are attributable to the wholesale conspiracy. The consumers argue that because they allege that the retail price was the one fixed, their theory of recovery does not depend on pass-on of damages; thus *Illinois Brick* does not apply.

We agree. The plaintiffs have offered to prove that the wholesale conspiracy ended in the early 1960's and that the conspiracy was ineffective in raising prices charged to retail grocers. In these circumstances, *Illinois Brick* is no bar since there would be no wholesale overcharge to be passed on to the consumers. Instead, we would be presented with a conspiracy among horizontal competitors at the retail level to

fix retail prices. *Illinois Brick* does not prevent this garden variety price-fixing claim.

Even if the plaintiffs were claiming a two-tier conspiracy, we would hold that *Illinois Brick* is no bar to the suit. Simply stated, the rule of *Illinois Brick* is that indirect purchasers in a chain of distribution are precluded from suing for damages based on unlawful overcharges passed on to them by intermediates in the distribution chain who purchased directly from the alleged antitrust violator. 431 U.S. at 746. [1] The Court recognized that indirect purchasers, even when able to trace an injury to an antitrust violation, are not in the "preferred position as private attorneys general" intended by Congress to enforce the antitrust laws. *Id.* The Court relied on two policy considerations to support its conclusion. First, it found that allowing every person along a chain of distribution to claim damages arising from a single violation of the antitrust laws would create a risk of duplicative recovery against the violator unintended by Congress. 431 U.S. at 730. The Court reasoned that direct purchasers absorb at least some and often most of the overcharges and are more likely to come forward to collect their damages. 431 U.S. at 746-47. Second, the Court sought to avoid increasing the cost and burden of antitrust actions with complicated

---

[1] In *Illinois Brick*, the State of Illinois sued manufacturers and distributors of concrete block claiming that the manufacturers had engaged in a combination and conspiracy to fix prices. The block manufacturers sold the blocks to masonry contractors who used them in masonry structures that were in turn used in buildings by general contractors. The buildings were then sold to the state. *Illinois Brick*, 431 U.S. 426-27. The Supreme Court held that the State of Illinois was not an injured person under the antitrust laws. The Court relied on its earlier decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) as a basis for its decision. In *Hanover Shoe*, the Court held that an antitrust violator could not defend an antitrust suit by a direct purchaser on the basis that the purchaser has not been injured because it had passed on an illegal overcharge to its own customers. 392 U.S. at 494. *Illinois Brick* involved the offensive use of this pass-on theory; the Court reasoned that symmetry required a bar to the offensive use of the pass-on rationale by indirect purchasers in the distribution chain. 431 U.S. at 736.

damage theories necessitating massive evidence to determine how the overcharge was apportioned throughout the distribution chain. 431 U.S. at 731-32, 745.

The Court in *Illinois Brick* expressly noted, however, that the newly announced rule barring damage suits by indirect purchasers was not absolute. [2] Whether allegations of a retail price-fixing conspiracy such as the one alleged by the consumers would avoid the bar of *Illinois Brick* was expressly reserved by this circuit in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 n.9 (9th Cir. 1982); *see also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1161-63 (5th Cir. 1979) (also reserving issue), *cert. denied*, 449 U.S. 905 (1980). Numerous other courts have found *Illinois Brick* inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediates in the distribution chain to fix the price at which the plaintiffs purchased. *See, e.g., Fontana Aviation, Inc. v. Cessna Air-*

---

[2] The Court mentioned two possible exceptions to the rule announced in *Illinois Brick*. First, the *Illinois Brick* rule does not apply where an indirect purchaser buys a predetermined quantity of goods subject to an illegal price-fixing arrangement from a direct purchaser operating under a "cost-plus" contract. Under such a contract, in setting the price at which to sell to indirect purchasers, the direct purchaser automatically adds a contractually predetermined sum to the price he paid the seller. Under these circumstances, "the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." 431 U.S. at 732 n.12.

The second exception arises "where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16. The Court recognized this circumstance as one "in which market forces have been superseded." *Id.* Courts analyzing this exception have held that it also applies where the direct purchaser is owned or controlled by its supplier. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d at 1160-61; *Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 974-75 (6th Cir. 1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 121 n.6 (D. Minn. 1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1104 (D. Md. 1979); *see also* Note, *Scaling the Illinois Brick Wall*, 63 Cornell L. Rev. 309, 327 (1978).

craft Co., 617 F.2d 478 (7th Cir. 1980); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1295-96 (D. Md. 1981); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 119-20 (D. Minn. 1980); *Abrams v. Interco Inc.*, 1980-2 Trade Cas. ¶ 63,292 at 75,552 (S.D.N.Y. 1980); *Vermont v. Densmore Brick Co.*, 1980-2 Trade Cas. ¶ 63,347, at 75,778 (D. Vt. 1980); *Florida Power Corp. v. Granlund*, 78 F.R.D. 441, 443 (D. Fla. 1978); *In re Anthracite Coal Antitrust Litigation*, 1978-1 Trade Cas. ¶ 62,059, at 74,587, 74,590 (D. Pa. 1978); *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. ¶ 61,789, at 73,245 (D. Ariz. 1977); *see also Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D.N.Y. 1973) (pre-*Illinois Brick*); Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L. Rev. 309, 331-32 (1978). We examine the facts of the present case to determine if the policies underlying *Illinois Brick* require dismissal of the consumers' action. *Blue Shield v. McCready*, 102 S. Ct. 2540, 2546, 50 U.S.L.W. 4723, 4725 (1982); *In re Petroleum Products Litigation*, 691 F.2d at 1339.

1. *Double Recovery*

Shamrock argues that if the consumers are allowed to recover, there will be multiple recovery because Shamrock has already settled with and paid the grocery store class. Shamrock adds that the bulk of the grocery stores, representing two-thirds of its business, opted out of the class and the settlement and still may have claims against Shamrock. Shamrock argues that a plaintiff may not avoid *Illinois Brick* under any theory when a substantial risk of multiple recovery exists.

The consumers reply that the small size of the settlement relative to the settlements previously reached indicates that Shamrock's settlement with the grocery stores was nothing more than a nuisance value settlement. The consumers give figures that indicate that the grocery store settlement scarcely covered attorneys' fees. Further, the consumers argue that the settlement should have no affect on their suit

based on a retail price-fixing conspiracy, particularly when the settlement agreement expressly preserved the consumers' suit.

We do not believe that there is a significant risk of double recovery in the present case of the type sought to be avoided by the *Illinois Brick* doctrine. The major concern in *Illinois Brick* was the risk of duplicative recovery by various members of the distribution chain for the same alleged overcharge. In the present case, however, the grocery store class settled for damages arising from a wholesale price-fixing conspiracy among the producers. The consumers no longer claim damages to themselves arising from an unlawful wholesale level conspiracy; they now rely solely on a damage theory based on a retail price-fixing conspiracy. If we accept the consumers' allegations of a retail price-fixing conspiracy as true, as we must on summary judgment, then we believe there is no danger of duplicative recovery if the consumers are allowed to sue for only that overcharge they prove resulted from a retail price-fixing conspiracy.

2. *Complex Damage Computation*

The district court held that in light of the confused history of the present case, "[a]n accurate computation of damages by a jury hearing a consumers' claim . . . would be a computational nightmare." Shamrock fleshes the argument out stating the problem as attempting "to sort out what portion of the retail price was caused by a wholesale conspiracy, what portion by a retail conspiracy, and what portion by other factors."

The consumers point out, however, that they have abandoned any attempt to prove a wholesale price-fixing conspiracy against Shamrock. Indeed, they offer to prove that there were no wholesale overcharges at all, thus removing at least one of the complicating factors. We believe that the concern in *Illinois Brick* was tracing a wholesale overcharge through an intermediary and allocating the retail price between an unlawful wholesale overcharge and market forces. These are not the concerns in the present case. Con-

fronted with a similar situation, the court in *In re Mid-Atlantic Toyota* stated:

> The principal of these policy factors, avoidance of tracing complexities, is inapposite when a dealer/distributor co-conspiracy is alleged. The injury suffered by the automobile purchasers through the effectuation of a voluntary co-conspiracy such as this can be determined by computing the retail price of a Toyota automobile but-for the alleged price fix, and subtracting that total from the actual purchase price. No other damage calculation would appear to be necessary on these allegations and no apportionment of passed-through overcharges is required. While such a calculation would appear to be a simple one, even if it is complex it would not be the type of complexity that the *Illinois Brick* Court was concerned with.

516 F. Supp. at 1295.

Thus, there is no need in the present case for the complicated allocation of an illegal overcharge sought to be avoided in *Illinois Brick* for the same reason that there is no risk of duplicative recovery. The consumers confine their claim for damages for dairy products purchased from grocery stores solely to that overcharge resulting from a retail level price-fixing conspiracy. There is no need to apportion that overcharge because it was not passed on to the consumers through any other level in the distribution chain. We hold that the policy considerations indentified in *Illinois Brick* do not apply to the consumers' allegations of a conspiracy between the grocery stores and Shamrock to fix the retail price of those products. We must now address, however, whether the district court correctly concluded that the consumers are estopped from relying on such a conspiracy.

B. *Estoppel Theory*

Shamrock points to three instances in which the consumers have altered their theory of recovery. In early 1978, the consumers argued an "umbrella" theory to avoid modifica-

tion of its class certification on the basis of *Illinois Brick*.[3] Later that year the consumers argued a pass-on theory in support of the agreement allocating the fund from the settlement with the other defendants. The consumers did receive a large portion of that fund, but they justified such an allocation not only on the basis that the grocery stores passed on the overcharge but also because of their "assertions that certain grocery stores allegedly participated in the illegal activities." Finally in 1980, the consumers amended their complaint and for the first time specifically named the grocery stores as co-conspirators, retaining the original language regarding fixing retail prices. Their original complaint had alleged that the dairy producers fixed wholesale *and* retail prices with unnamed co-conspirators.

The consumers defend their actions on the ground that they were unaware, until after substantial discovery, what theory they could prove. The original general allegation of a retail conspiracy was never wholly abandoned by the consumers. They also argue that the theories they espoused are not in conflict; it is possible, they argue, to allege both retail and wholesale price-fixing conspiracies without conflict.

The district court focused on the settlements. It reasoned that the consumers benefitted from their pass-on theory in the allocation agreement and remained mute while Shamrock settled with the grocery stores insuring multiple liability if the consumers also recover. The district court held the consumers estopped from asserting the retail price-fixing theory. The court would have been correct if the same

---

[3] Under the umbrella theory, plaintiffs argue that the defendants' successful price-fixing conspiracy created a "price umbrella" allowing nonconspiring competitors of defendants to raise their prices to an artificially high level at or near the fixed price. Because the defendants allegedly are responsible for the market condition making this conduct possible, plaintiffs argue that the defendants should be liable not only for damages directly resulting from their alleged price-fixing activities, but also for damages resulting from their competitors' higher prices. The umbrella theory was later rejected as a means of avoiding *Illinois Brick* in *In re Petroleum Litigation*, 692 F.2d at 1338-41.

wholesale conspiracy was the basis for the consumers' present claim against Shamrock. As we have previously explained, however, the consumers now allege a separate retail conspiracy which was not the same as the wholesale conspiracy for which Shamrock settled with the grocery stores.

The issue of when a party may be estopped from relying on seemingly inconsistent theories or positions appears to be a matter of first impression in the Ninth Circuit. In *Garcia v. Andrus*, 692 F.2d 89 (9th Cir. 1982), this court acknowledged that the doctrine of judicial estoppel acts to bar advancement of truly inconsistent positions but did not find it necessary to enumerate the requirements for application of the doctrine. 692 F.2d at 94. The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings." 1B *Moore's Federal Practice* ¶ .405[8], at 767. One court has stated the rule:

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953) (citations omitted); *see also Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980). The federal courts generally require that the prior inconsistent position must have been successfully maintained and that there must be reliance by, or prejudice to, the opposing party. 1B *Moore's Federal Practice* ¶ .405[8], at 769-70. *See Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (success required; set-

tlement is not success). The emphasis is not on a hard and fast rule, but rather on prevention of "intentional self-contradiction . . . as a means of obtaining unfair advantage." *Scarano*, 203 F.2d at 513.

> The consumers point out that this kind of estoppel contemplates something other than the permissible practice, now freely allowed, of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached. See Fed. R. Civ. P. 8(e)(2).

Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982); *see also New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963), *cert. denied*, 376 U.S. 963 (1964). The consumers argue that the Federal Rules of Civil Procedure emphasize liberalized pleading and proof and that to apply estoppel here would be to return to the days when a claim of merit could be forfeited by a misstep on the procedural pathway.

In the present case we hold that the consumers are not estopped from proceeding with the litigation on a retail price-fixing conspiracy. The theories advanced by the consumers do not necessarily conflict in that the existence of a conspiracy at the wholesale level does not preclude the existence of an independent conspiracy at the retail level.

Further, it is difficult to see how Shamrock would be prejudiced by allowing the consumers to change theories. It is true that Shamrock has settled with the grocery store class, but that settlement could hardly be said to be a result of reliance on the consumer's original wholesale price-fixing theory. As we found above, the consumers' theory of a retail price-fixing conspiracy contemplates an overcharge wholly distinct from any overcharge resulting from a wholesale level conspiracy. In any case, Shamrock's grocery store settlement occurred after the consumers amended their complaint to allege that the grocery stores were co-conspirators with the

producers to fix retail prices. Shamrock was on notice of the change in theory before the settlement occurred, yet expressly excluded the consumers from that settlement. We note, also, that the consumers have gained nothing from Shamrock on the basis of their prior inconsistent position although they have received a favorable apportionment of a settlement from the other defendants based on that position.

There is little of the "playing fast and loose" in the present case that the doctrine of judicial estoppel was intended to preclude. Rather, the consumer class was attempting to alter its theory of recovery in response to advanced discovery and to the change in the law brought about by *Illinois Brick.*[4] Although this is a close case, we hold that the consumers should be allowed to attempt proof of a retail price-fixing conspiracy.

Accordingly, the grant of summary judgment is reversed and the case is remanded to the district court for trial.

REVERSED and REMANDED.

---

[4] Shamrock also argues that the law of the case doctrine would preclude the consumers' change of theory. That doctrine holds that in the interest of finality a court need not reopen that which it has already decided. *See* 1B *Moore's Federal Practice* ¶ .404[1] (2d ed. 1982). In the present case, however, the trial court had made no prior determination concerning the consumers' theory of recovery. We do not believe law of the case may be predicated on the rulings approving the settlement agreements for the same reason that collateral estoppel does not apply to settlements. *See* 1B *Moore's Federal Practice* ¶ .443[4], at 3917 (2d ed. 1982). The trial court decided nothing concerning the consumers' theories; it only decided that the settlements were fair and reasonable to the absent class members. *See* 3B *Moore's Federal Practice* ¶ 23.40[4], at 23-519.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, Plaintiff-Appellant, v. SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation, Defendants-Appellees.	No. 82-5875 CV 74-569A PHX, CAM, 74-736 PHX, CAM
DARRYLL J. ALTON, et al., Plaintiffs-Appellants, v. SHAMROCK FOODS COMPANY, an Arizona corporation, and BEATRICE FOODS COMPANY, an Illinois corporation, Defendants-Appellees.	ORDER

Before: KENNEDY and BOOCHEVER, Circuit Judges, and EAST, * Senior District Judge.

IT IS HEREBY ORDERED that the following portion of the above entitled opinion is deleted:

> Commencing at page 1633, column 2, line 27, "The federal courts generally require that the prior inconsistent position . . ." through "success required; settlement is not success)." at line 36.
>
> Commencing at page 1634, column 1, third full paragraph commencing at line 30 through page 1634, column 2, line 20.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

SHAMROCK FOODS COMPANY, an Arizona corporation; and Beatrice Foods Company, an Illinois corporation, Defendants-Appellees.

Darryll J. ALTON, et al.,
Plaintiffs-Appellants,

v.

SHAMROCK FOODS COMPANY, an Arizona corporation, and Beatrice Foods Company, an Illinois corporation, Defendants-Appellees.

No. 82-5875.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 13, 1983.
Decided April 3, 1984.
As Amended June 21, 1984.

An action was filed by five certified classes against wholesale dairy product producers alleging wholesale price-fixing conspiracy. During the course of the suit, all claims were settled except those by the consumer class against one producer and another producer joined six years after initiation of the suit. The United States District Court for the District of Arizona, C.A. Muecke, Chief Judge, granted the wholesale producer's motion for partial summary judgment. Consumers appealed. The Court of Appeals, Boochever, Circuit Judge, held that: (1) the rule barring damage suits by indirect purchasers did not bar a claim by a class of consumers against the wholesale dairy product producer alleging that the wholesale producer, which competed with grocery stores on the retail level, conspired with the grocery stores to fix the retail price of milk, and (2) the consumers were not estopped from changing their theory of the case from one alleging a wholesale price-fixing conspiracy to one alleging a retail price-fixing conspiracy.

Reversed and remanded.

J. Michael Hennigan, Bretz & Hennigan, Los Angeles, Cal., for plaintiff-appellant.

Charles R. Hoover, Jennings, Strouss & Salmon, Scottsdale, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before KENNEDY and BOOCHEVER, Circuit Judges, and EAST.* Senior District Judge.

BOOCHEVER, Circuit Judge.

This is an action by five certified classes against several Arizona dairy product producers alleging a wholesale price-fixing conspiracy. During the course of the suit, all claims were settled except those by the consumer class against Shamrock Foods Co. and another producer joined six years after initiation of the suit. Shamrock moved for partial summary judgment on the ground that the consumers' claims for pass-on damages from purchases of dairy products through grocery stores were barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). The consumers contend that they have altered their theory of recovery to allege a retail price-fixing conspiracy including the intermediate grocery stores, thus avoiding *Illinois Brick*. The district court granted partial summary judgment finding the consumers estopped from changing theories of recovery so late in the litigation. The consumers appeal.

Facts

Following the institution of a federal civil and criminal wholesale price-fixing suit against Shamrock Foods Co., Borden Inc., Carnation Co., Foremost-McKesson Inc. and six of their officers, a number of private suits were filed against the corporations seeking damages and injunctive relief. On December 11, 1974, the district court consolidated the actions and certified plaintiff classes of consumers, grocery stores, hospitals, restaurants, and governmental entities.

*Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

The five classes subsequently reached a $4,075,000 settlement with all defendants except Shamrock. The settlement agreement and a separate agreement allocating the fund among the five classes were filed with the district court in April 1978. On September 21, 1979, Shamrock settled with the hospital, restaurant, and governmental classes and in mid-1981 Shamrock settled with the grocery store class. The settlements and the allocation agreement were formally approved by the district court, and each expressly preserved the consumer class claims against Shamrock. Thus, the only remaining claims were the consumer claims against Shamrock. These claims were of two types: for overcharges in sales of dairy products through grocery stores and for overcharges in direct sales from Shamrock by home-delivery.

In mid-1982, Shamrock filed a motion for partial summary judgment to dismiss all claims of the consumers regarding damages for purchases of dairy products through grocery stores. It argued that *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) required dismissal of the consumers' claims. The consumers responded that they have changed their theory of recovery to allege a price-fixing conspiracy including the dairy producers and the grocery stores to fix the retail price of dairy products.

The consumers point out that Shamrock and the other defendant dairies made retail home delivery sales in addition to wholesale sales to grocery stores and thus were both suppliers to and direct horizontal competitors with the grocery stores. When the grocery store prices fell too low, Shamrock and the other dairy defendants lost home delivery sales to the grocery stores. The consumers contend that the dairy producers conspired among themselves and with the grocery stores to raise and stabilize the retail price of dairy products to maintain more profits for all concerned.

In support of their contention, the consumers cite deposition testimony of employees of several dairy producers including Shamrock President Norman McClelland. This testimony tends to support the consumers' allegations that

the dairy producers held meetings to discuss retail prices and regularly had communications with grocery stores with the purpose of acting as a go-between to give assurances that a price increase by one retailer would be met by competing retailers.

The district court granted Shamrock's motion on July 23, 1982 and entered final judgment on those claims pursuant to Fed. R.Civ.P. 54(b) on September 23, 1982. The consumer class now appeals the grant of partial summary judgment to Shamrock. We reverse.

Standard of Review

Reviewing a grant of summary judgment, the appellate court must view the evidence in the light most favorable to the party against whom summary judgment was granted and determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir.1980).

Discussion

Shamrock makes two arguments that the grant of summary judgment is correct. First, they argue that when, as alleged in the present case, the policy concerns of *Illinois Brick* are present, that case bars suit no matter what theory is used. Second, they argue that the consumers relied to their advantage at various times on the wholesale price conspiracy pass-on theory and may not at this late date change theories to a retail price conspiracy to avoid *Illinois Brick*. The district court granted summary judgment on the basis of both arguments.

A. *Illinois Brick*

The consumers do not dispute that at the initiation of their suit, their focus was on a wholesale price-fixing conspiracy. Because this theory of necessity implies a pass-on of damages to the retail level, the consumers do not dispute that *Illinois Brick* would preclude their recovery on their original theory regarding their purchase of dairy products

from grocery stores. But they contend that they have changed their theory; they now allege that the retail intermediates, the grocery stores, were co-conspirators with the dairy producers to fix the price of dairy products at the retail level, and that none of the damages now claimed are attributable to the wholesale conspiracy. The consumers argue that because they allege that the retail price was the one fixed, their theory of recovery does not depend on pass-on of damages; thus *Illinois Brick* does not apply.

We agree. The plaintiffs have offered to prove that the wholesale conspiracy ended in the early 1960's, and that the conspiracy was ineffective in raising prices charged to retail grocers. In these circumstances, *Illinois Brick* is no bar since there would be no wholesale overcharge to be passed on to the consumers. Instead, we would be presented with a conspiracy among horizontal competitors at the retail level to fix retail prices. *Illinois Brick* does not prevent this garden variety price-fixing claim.

Even if the plaintiffs were claiming a two-tier conspiracy, we would hold that *Illinois Brick* is no bar to the suit. Simply stated, the rule of *Illinois Brick* is that indirect purchasers in a chain of distribution are precluded from suing for damages based on unlawful overcharges passed on to them by intermediates in the distribution chain who purchased directly from the alleged antitrust violator. 431 U.S.

at 746, 97 S.Ct. at 2074.[1] The Court recognized that indirect purchasers, even when able to trace an injury to an antitrust violation, are not in the "preferred position as private attorneys general" intended by Congress to enforce the antitrust laws. *Id.* The Court relied on two policy considerations to support its conclusion. First, it found that allowing every person along a chain of distribution to claim damages arising from a single violation of the antitrust laws would create a risk of duplicative recovery against the violator unintended by Congress. 431 U.S. at 730, 97 S.Ct. at 2066. The Court reasoned that direct purchasers absorb at least some and often most of the overcharges and are more likely to come forward to collect their damages. 431 U.S. at 746-47, 97 S.Ct. at 2074-75. Second, the Court sought to avoid increasing the cost and burden of antitrust actions with complicated damage theories necessitating massive evidence to determine how the overcharge was apportioned throughout the distribution chain. 431 U.S. at 731-32, 745, 97 S.Ct. at 2067, 2074.

The Court in *Illinois Brick* expressly noted, however, that the newly announced rule barring damage suits by indirect

---

[1] In *Illinois Brick*, the State of Illinois sued manufacturers and distributors of concrete block claiming that the manufacturers had engaged in a combination and conspiracy to fix prices. The block manufacturers sold the blocks to masonry contractors who used them in masonry structures that were in turn used in buildings by general contractors. The buildings were then sold to the state. *Illinois Brick*, 431 U.S. 426-27, 97 S.Ct. at 2064-65. The Supreme Court held that the State of Illinois was not an injured person under the antitrust laws. The Court relied on its earlier decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) as a basis for its decision. In *Hanover Shoe*, the Court held that an antitrust violator could not defend an antitrust suit by a direct purchaser on the basis that the purchaser has not been injured because it had passed on an illegal overcharge to its own customers. 392 U.S. at 494, 88 S.Ct. at 2234. *Illinois Brick* involved the offensive use of this pass-on theory; the Court reasoned that symmetry required a bar to the offensive use of the pass-on rationale by indirect purchasers in the distribution chain. 431 U.S. at 736, 97 S.Ct. at 2069.

purchasers was not absolute.[2] Whether allegations of a retail price-fixing conspiracy such as the one alleged by the consumers would avoid the bar of *Illinois Brick* was expressly reserved by this circuit in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1341 n. 9 (9th Cir.1982); *see also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1161-63 (5th Cir.1979) (also reserving issue), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980). Numerous other courts have found *Illinois Brick* inapplicable to claims against remote sellers when the plaintiffs allege that the sellers conspired with intermediates in the distribution chain to fix the price at which the plaintiffs purchased. *See, e.g., Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir.1980); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F.Supp. 1287, 1295-96 (D.Md.1981); *Reiter v. Sonotone Corp.*, 486 F.Supp. 115, 119-20 (D.Minn.1980); *Abrams v. Interco Inc.*, 1980-2 Trade Cas. ¶ 63,292 at 75,552

---

[2] The Court mentioned two possible exceptions to the rule announced in *Illinois Brick*. First, the *Illinois Brick* rule does not apply where an indirect purchaser buys a predetermined quantity of goods subject to an illegal price-fixing arrangement from a direct purchaser operating under a "cost-plus" contract. Under such a contract, in setting the price at which to sell to indirect purchasers, the direct purchaser automatically adds a contractually predetermined sum to the price he paid the seller. Under these circumstances, "the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." 431 U.S. at 732 n. 12, 97 S.Ct. at 2067 n. 12.

The second exception arises "where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n. 16, 97 S.Ct. at 2070 n. 16. The Court recognized this circumstance as one "in which market forces have been superseded." *Id.* Courts analyzing this exception have held that it also applies where the direct purchaser is owned or controlled by its supplier. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d at 1160-61; *Jewish Hospital Association v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 974-75 (6th Cir.1980); *Reiter v. Sonotone Corp.*, 486 F.Supp. 115, 121 n. 6 (D.Minn.1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F.Supp. 1091, 1104 (D.Md.1979); *see also* Note, *Scaling the Illinois Brick Wall*, 63 Cornell L.Rev. 309, 327 (1978).

(S.D.N.Y.1980); *Vermont v. Densmore Brick Co.*, 1980-2 Trade Cas. ¶ 63-347, at 75,778 (D.Vt.1980); *Florida Power Corp. v. Granlund*, 78 F.R.D. 441, 443 (D.Fla.1978); *In re Anthracite Coal Antitrust Litigation*, 1978-1 Trade Cas. ¶ 62,059, at 74,587, 74,590 (D.Pa.1978); *Gas-A-Tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. ¶ 61,789, at 73,245 (D.Ariz.1977); *see also Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D.N.Y.1973) (pre-*Illinois Brick*); Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 331-32 (1978). We examine the facts of the present case to determine if the policies underlying *Illinois Brick* require dismissal of the consumers' action. *Blue Shield v. McCready*, 457 U.S. 465, 473, 102 S.Ct. 2540, 2546, 73 L.Ed.2d 149 (1982); *In re Petroleum Products Litigation*, 691 F.2d at 1339.

1. *Double Recovery*

Shamrock argues that if the consumers are allowed to recover, there will be multiple recovery because Shamrock has already settled with and paid the grocery store class. Shamrock adds that the bulk of the grocery stores, representing two-thirds of its business, opted out of the class and the settlement and still may have claims against Shamrock. Shamrock argues that a plaintiff may not avoid *Illinois Brick* under any theory when a substantial risk of multiple recovery exists.

The consumers reply that the small size of the settlement relative to the settlements previously reached indicates that Shamrock's settlement with the grocery stores was nothing more than a nuisance value settlement. The consumers give figures that indicate that the grocery store settlement scarcely covered attorneys' fees. Further, the consumers argue that the settlement should have no effect on their suit based on a retail price-fixing conspiracy, particularly when the settlement agreement expressly preserved the consumers' suit.

We do not believe that there is a significant risk of double recovery in the present case of the type sought to be avoided by the *Illinois Brick* doctrine. The major concern in *Illinois Brick* was the risk of duplicative recovery by various members of the distribution chain for the same alleged overcharge. In the present case, however, the grocery store class settled for damages arising from a wholesale price-fixing conspiracy among the producers. The consumers no longer claim damages to themselves arising from an unlawful wholesale level conspiracy; they now rely solely on a damage theory based on a retail price-fixing conspiracy. If we accept the consumers' allegations of a retail price-fixing conspiracy as true, as we must on summary judgment, then we believe there is no danger of duplicative recovery if the consumers are allowed to sue for only that overcharge they prove resulted from a retail price-fixing conspiracy.

2. *Complex Damage Computation*

The district court held that in light of the confused history of the present case, "[a]n accurate computation of damages by a jury hearing a consumers' claim . . . would be a computational nightmare." Shamrock fleshes the argument out stating the problem as attempting "to sort out what portion of the retail price was caused by a wholesale conspiracy, what portion by a retail conspiracy, and what portion by other factors."

The consumers point out, however, that they have abandoned any attempt to prove a wholesale price-fixing conspiracy against Shamrock. Indeed, they offer to prove that there were no wholesale overcharges at all, thus removing at least one of the complicating factors. We believe that the concern in *Illinois Brick* was tracing a wholesale overcharge through an intermediary and allocating the retail price between an unlawful wholesale overcharge and market forces. These are not the concerns in the present case. Confronted with a similar situation, the court in *In re Mid-Atlantic Toyota* stated:

> The principal of these policy factors, avoidance of tracing complexities, is inapposite when a dealer/distributor co-conspiracy is alleged. The injury suffered by the automobile purchasers through the effectuation of a voluntary co-conspiracy such as this can be determined by computing the retail price of a Toyota automobile but-for the alleged price fix, and subtracting that total from the actual purchase price. No other damage calculation would appear to be necessary on these allegations and no apportionment of passed-through overcharges is required. While such a calculation would appear to be a simple one, even if it is complex it would not be the type of complexity that the *Illinois Brick* Court was concerned with.

516 F.Supp. at 1295.

Thus, there is no need in the present case for the complicated allocation of an illegal overcharge sought to be avoided in *Illinois Brick* for the same reason that there is no risk of duplicative recovery. The consumers confine their claim for damages for dairy products purchased from grocery stores solely to that overcharge resulting from a retail level price-fixing conspiracy. There is no need to apportion that overcharge because it was not passed on to the consumers through any other level in the distribution chain. We hold that the policy considerations identified in *Illinois Brick* do not apply to the consumers' allegations of a conspiracy between the grocery stores and Shamrock to fix the retail price of those products. We must now address, however, whether the district court correctly concluded that the consumers are estopped from relying on such a conspiracy.

B. *Estoppel Theory*

Shamrock points to three instances in which the consumers have altered their theory of recovery. In early 1978, the consumers argued an "umbrella" theory to avoid modifica-

tion of its class certification on the basis of *Illinois Brick.*[3] Later that year the consumers argued a pass-on theory in support of the agreement allocating the fund from the settlement with the other defendants. The consumers did receive a large portion of that fund, but they justified such an allocation not only on the basis that the grocery stores passed on the overcharge but also because of their "assertions that certain grocery stores allegedly participated in the illegal activities." Finally in 1980, the consumers amended their complaint and for the first time specifically named the grocery stores as co-conspirators, retaining the original language regarding fixing retail prices. Their original complaint had alleged that the dairy producers fixed wholesale *and* retail prices with unnamed co-conspirators.

The consumers defend their actions on the ground that they were unaware, until after substantial discovery, what theory they could prove. The original general allegation of a retail conspiracy was never wholly abandoned by the consumers. They also argue that the theories they espoused are not in conflict; it is possible, they argue, to allege both retail and wholesale price-fixing conspiracies without conflict.

The district court focused on the settlements. It reasoned that the consumers benefitted from their pass-on theory in the allocation agreement and remained mute while Shamrock settled with the grocery stores insuring multiple liability if the consumers also recover. The district court held the consumers estopped from asserting the retail price-fixing theory. The court would have been correct if the same

---

[3] Under the umbrella theory, plaintiffs argue that the defendants' successful price-fixing conspiracy created a "price umbrella" allowing nonconspiring competitors of defendants to raise their prices to an artifically high level at or near the fixed price. Because the defendants allegedly are responsible for the market condition making this conduct possible, plaintiffs argue that the defendants should be liable not only for damages directly resulting from their alleged price-fixing activities, but also for damages resulting from their competitors' higher prices. The umbrella theory was later rejected as a means of avoiding *Illinois Brick* in *In re Petroleum Litigation*, 692 F.2d at 1338-41.

wholesale conspiracy was the basis for the consumers' present claim against Shamrock. As we have previously explained, however, the consumers now allege a separate retail conspiracy which was not the same as the wholesale conspiracy for which Shamrock settled with the grocery stores.

The issue of when a party may be estopped from relying on seemingly inconsistent theories or positions appears to be a matter of first impression in the Ninth Circuit. In *Garcia v. Andrus*, 692 F.2d 89 (9th Cir.1982), this court acknowledged that the doctrine of judicial estoppel acts to bar advancement of truly inconsistent positions but did not find it necessary to enumerate the requirements for application of the doctrine. 692 F.2d at 94. The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings." 1B *Moore's Federal Practice* ¶ .405[8], at 767. One court has stated the rule:

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953) (citations omitted); *see also Konstantinidis v. Chen*, 626 F.2d 933 (D.C.Cir.1980). The emphasis is not on a hard and fast rule, but rather on prevention of "intentional self-contradiction ... as a means of obtaining unfair advantage." *Scarano*, 203 F.2d at 513.

The consumers point out that this kind of estoppel

> contemplates something other than the permissible practice, now freely allowed, of simultaneously advancing in the same action inconsistent claims or defenses which can then, under appropriate judicial control, be evaluated as such by the same tribunal, thus allowing an internally consistent final decision to be reached. See Fed.R.Civ.P. 8(e)(2).

Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir.1982); *see also New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir.1963), *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124. 11 L.Ed.2d 981 (1964). The consumers argue that the Federal Rules of Civil Procedure emphasize liberalized pleading and proof and that to apply estoppel here would be to return to the days when a claim of merit could be forfeited by a misstep on the procedural pathway.

In the present case we hold that the consumers are not estopped from proceeding with the litigation on a retail price-fixing conspiracy. The theories advanced by the consumers do not necessarily conflict in that the existence of a conspiracy at the wholesale level does not preclude the existence of an independent conspiracy at the retail level.

There is little of the "playing fast and loose" in the present case that the doctrine of judicial estoppel was intended to preclude. Rather, the consumer class was attempting to alter its theory of recovery in response to advanced discovery and to the change in the law brought

about by *Illinois Brick.*[4] Although this is a close case, we hold that the consumers should be allowed to attempt proof of a retail price-fixing conspiracy.

Accordingly, the grant of summary judgment is reversed and the case is remanded to the district court for trial.

REVERSED AND REMANDED.

---

[4] Shamrock also argues that the law of the case doctrine would preclude the consumers' change of theory. That doctrine holds that in the interest of finality a court need not reopen that which it has already decided. *See* 1B *Moore's Federal Practice* ¶ .404[1] (2d ed. 1982). In the present case however, the trial court had made no prior determination concerning the consumers' theory of recovery. We do not believe law of the case may be predicated on the rulings approving the settlement agreements for the same reason that collateral estoppel does not apply to settlements. *See* 1B *Moore's Federal Practice* ¶ .443[4], at 3917 (2d ed. 1982). The trial court decided nothing concerning the consumers' theories; it only decided that the settlements were fair and reasonable to the absent class members. *See* 3B *Moore's Federal Practice* ¶ 23.40[4], at 23-519.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

No. 82-5875
CV 74-569A PHX, CAM,
74-736 PHX, CAM

DARRYLL J. ALTON, et al.,
Plaintiffs-Appellants,
v.
SHAMROCK FOODS COMPANY, an Arizona corporation, and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

ORDER

Before: KENNEDY and BOOCHEVER, Circuit Judges, and EAST, * Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
SHAMROCK FOODS COMPANY, an Arizona corporation; and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

No. 82-5875
CV 74-569A
PHX, CAM,
74-736
PHX, CAM

DARRYLL J. ALTON, et al.,
Plaintiffs-Appellants,
v.
SHAMROCK FOODS COMPANY, an Arizona corporation, and BEATRICE FOODS COMPANY, an Illinois corporation,
Defendants-Appellees.

ORDER

Before: KENNEDY and BOOCHEVER, Circuit Judges, and EAST, * Senior District Judge.

The motion of defendant-appellee Shamrock Foods Company for reconsideration of the petition for rehearing and suggestion for rehearing en banc is hereby denied.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.